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CASE NO. 80-1770

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RALPH D. TURLINGTON, individually and in his official capacity as COMMISSIONER OF EDUCATION, STATE OF FLORIDA, DEPARTMENT OF EDUCATION, et al.,

Petitioners,

v.

S-1, a minor, by and through his mother and next friend, P-1, et al.,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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The Court requested a supplemental brief to address the following:

QUESTION PRESENTED

Has this case become moot?

THE CASE IS NOT MOOT.

The case has not become moot because:

Some of the Respondents (Plaintiffs) are still attending school in Hendry County, Florida. See Supplemental Brief of Petitioners in Case Number 80-1791.

The Petitioners in this case (State Defendants) are under a continuing injunction to insure that the Local Defendants (Respondents here, Petitioners in Case Number 80-1791) are providing the Plaintiffs "with all the rights to which they are entitled under

the Education for All Handicapped Children Act, 20 U.S.C. §1401 et. seq. and its implementing regulations, 45 C.F.R. Part 121a." (A.42).

The rights to which Plaintiffs claim an entitlement include the court of appeals' gratuitous, but clearly erroneous, conclusion that educational services can never be terminated.

The fundamental error asserted before this Court is an error of the court of appeals. It expanded the district court's injunction when it decided an issue that the district court declined to decide (i.e., that a complete cessation of educational services is never permitted by Section 504 and the EHA). See A.25-26, 36, 51-52. It altered the relative

positions of the parties. It erroneously affirmed the district court's decision by finding no abuse of discretion in reliance upon an erroneous interpretation of the law. It nullified the provisions of Section 228.041(28), Florida Statutes (1979), which provides that expulsion "is the removal of the right . . . to attend a public school", or, alternatively, compelled nonpublic school placement when there is an appropriate public school program, if the student would behave. It went beyond the trial court's determination of "likelihood of success" and decided questions of law to remove "gray areas".

An application of this Court's power is necessary to bring the court of appeals back into the mainstream of

judicial restraint and to eradicate egregious errors of law.

The State Defendants can assert that the court of appeals' statements are dicta (Kastigar v. United States, 406 U.S. 441, 454) and that they are not the law of the case (Camenisch, infra); but, unless this Court acts, the erroneous statements may remain in perpetuity. It is not likely that the district judge will deviate from the higher court's statement of the law. See National Airlines, Inc. v. International Ass'n. of Machinists and Aerospace Workers, 430 F.2d 957, 960 (5th Cir. 1970), cert. denied, 400 U.S. 992, where the same district judge was held by the court of appeals to have been bound by its previous interpretation of law which

had been made in reviewing a case involving a preliminary injunction. Cf. University of Texas v. Camenisch, ____ U.S.____, 68 L.Ed.2d 175, 101 S.Ct. 1830 (1981), which states that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." 68 L.Ed.2d at 180. This particular law (the EHA) has its own self-executing injunction. A misbehaving student can claim that he is entitled to be returned to his original placement (i.e., school setting). See 20 U.S.C. §1415(e)(3), Pet. p. 47. The school officials must comply. The State Defendants have been directed to see that this is done. In the absence of tactical recalcitrance, the issue

will never be subject to review unless the Court recognizes that the mootness doctrine does not apply to these circumstances. See Roe v. Wade, 410 U.S. 113, 124-125.

The issues presented are alive and the parties have a legally cognizable interest in the outcome of this case.

The state and local officials are under an injunction which imposes a continuing obligation to act. No single act or event has occurred that can be used to conclude that the terms of the injunction have been fully and irrevocably carried out. Defendants must comply with the injunction, as it was broadened by the court of appeals, or face a citation for contempt of court. Voluntary cessation of allegedly illegal

conduct does not deprive this Court of the power to determine a case, therefore, it cannot reasonably be said that compelled cessation of allegedly illegal practices deprives this Court of the power to act and determine once and for all whether or not the practice is illegal. See County of Los Angeles v. Davis, 440 U.S. 625, 631, and United States v. W. T. Grant Co., 345 U.S. 629, 632.

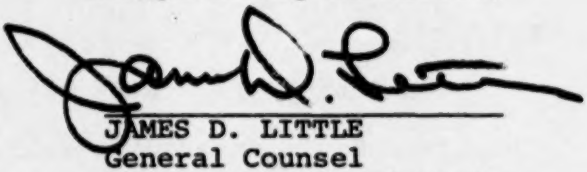
The Plaintiffs state that the "District Court entered no relief under Section 504" (Respondents' Brief, p. 6). If this is true, the court of appeals' and the district court's reliance on Section 504 is clearly erroneous.

The court of appeals did not have the benefit of this Court's decision in

Pennhurst State School v. Halderman, ____ U.S. ____, 67 L.Ed.2d 694, 101 S.Ct. 1531.

It is suggested that the Court grant the petition for certiorari and summarily vacate the court of appeals' judgment and decision, and remand the case to the district court for reconsideration in light of Pennhurst.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Supplemental Brief of Petitioners were mailed to JOHN W. BOWEN, Post Office Box 3462, Orlando, Florida 32802, and JACOB A. ROSE, 117 South Martin Luther King Boulevard, Tallahassee, Florida 32301, this 23rd day of October, 1981.



JAMES D. LITTLE